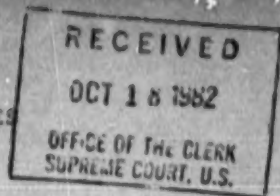


IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM
1982

USSC NO. 82-5378



CLAY ANTHONY FORD

PETITIONER

VS.

STATE OF ARKANSAS

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN
OPPOSITION TO PETITION

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ATTORNEYS FOR RESPONDENT

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Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the right of the petitioner to a fair trial as guaranteed by the Sixth and Fourteenth Amendments was abridged by the introduction during the guilt phase of evidence of prior criminal convictions.

2. Whether the right of the petitioner, a black, to a fair trial as guaranteed by the Sixth and Fourteenth Amendment were abridged by the selection of his jury from an panel that did not reflect a cross section of the community and had a gross underrepresentation of blacks.

3. Whether the right of the petitioner to a fair trial as guaranteed by the Sixth and Fourteenth Amendments was abridged by the introduction into evidence during the penalty phase of evidence of prior convictions.

4. Whether the right of the petitioner, a black, to equal protection of the law as guaranteed by the Fourteenth Amendment and his right not to be subjected to cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments were abridged by the operation of a criminal justice system that results in the sentencing of a disproportionate number of blacks to the death penalty.

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The opinion of the Arkansas Supreme Court affirming petitioner's conviction and death sentence is reported at Ford v. State, 276 Ark. 98, 663 S.W.2d 3 (1982). Copies of the opinion were submitted by the petitioner with his application for a stay of execution and his motion for an extension of time.

JURISDICTION

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Ark. Stat. Ann. §28-1001 , Rule 404(b) (Repl. 1979):

(b) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

On October 1, 1980, appellant was charged by an information filed in the Circuit Court of Crittenden County with Capital Murder. It was alleged that the appellant shot and killed a law enforcement officer, Sergeant Glen Bailey, of the Arkansas State Police, in violation of Ark. Stat. Ann. §41-1501(b) (Repl. 1977).

Upon a motion for a change of venue by the appellant, the trial was moved to Mississippi County. The case was tried before a jury on May 26, 1981 to June 1, 1981. At the conclusion of the evidence, appellant was found guilty of capital murder. Evidence was then received relevant to sentencing. At the conclusion of the penalty phase of the bifurcated trial, the appellant was sentenced to death by electrocution. A motion for a new trial was denied on July 22, 1981. The conviction was affirmed on appeal with a petition for rehearing being denied on June 7, 1982.

I.

THE INTRODUCTION OF EVIDENCE OF PRIOR CRIMINAL CONVICTIONS IN THE GUILT PHASE OF THE TRIAL WAS PROPER UNDER STATE EVIDENTIARY LAW AND DID NOT ABRIDGE PETITIONER'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

Petitioner was charged with a capital murder, a violation of Ark. Stat. Ann. §41-1501(b) (Repl. 1977) which provides:

41-1501. Capital murder. (1) A person commits capital murder if:

(b) with the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, fireman, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person;

The State alleged that the petitioner caused the death of Sgt. Glen Bailey of the Arkansas State Police.

At the time of the crime, the petitioner was unlawfully at liberty from the Tennessee Department of Corrections where he was serving a sentence on convictions of burglary and grand larceny. He was also in possession of property stolen from two different individuals.

The State planned to introduce evidence of the petitioner's escapee status, the basis of such status, and evidence that he was in possession of stolen property as relevant to his motive and intent in killing a law enforcement officer. The petitioner approached the bench during the State's opening argument and made an oral motion in limine to prevent the mention of the escape, and the prior convictions. (T. 694)

The trial court held:

The motion in limine will be denied and the State will be permitted in its case in chief to show that the defendant was a prior convicted felon, that is the conviction for which he was serving at the time.

The motion in limine will be granted as to any other convictions which he may have served, been paroled or released on. Only that conviction for which he was an escapee. (T. 695)

After further discussion at the bench, the court added as to the prior convictions:

In showing the prior convictions which the defendant was serving, I would grant the motion in limine in so far as to show the convictions and his escape without dwelling on the details or gory events, details of those convictions. It is not necessary. (T. 700)

The State mentioned in its opening statement that it was discovered during the investigation of this case that the appellant "was wanted for an escape from the Memphis Community Service Center where he was serving a sentence of - completing a sentence of three years on convictions of burglary in the third degree, grand larceny and burglary in the second degree." (T. 704) Sam Bachelor, Associate Warden for the Memphis Community Service Center, testified that the petitioner had departed that institution without authority on July 22, 1980, and that he was there serving time having been convicted of a felony. (T. 947) In keeping with the trial court's ruling, no specific information was given on the prior felony convictions other than that a felony conviction served as the basis for appellant's lawful incarceration from which he had escaped.

On appeal, petitioner contended that this evidence was not relevant to motive and intent and that it was error to allow the State to mention it in opening argument and to introduce such evidence in the guilt phase of the trial. The Arkansas Supreme Court affirmed the trial court's relevancy ruling that this evidence was introduced for a proper purpose.

States are free to adopt relevancy rules and apply them in accord with State law without violating the Fourteenth Amendment. Lisenba v. California, 314 U.S. 219 (1941) Respondent submits that the introduction of evidence of prior criminal convictions in this case was proper under State evidentiary law.

The general rule applicable in Arkansas and most jurisdictions is that other crimes are not admissible to show that the defendant acted in conformity therewith. Rule 404(b) of the Arkansas Uniform Rules of Evidence provides, however, that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Emphasis added.)

Ark. Stat. Ann. 528-1001 (Repl. 1979)

The trial court properly determined that the evidence of prior convictions was relevant to the issue of motive or intent and made the further determination that the evidence was more probative than prejudicial. The Arkansas Supreme Court specifically found that Alford v. State, 223 Ark. 330, 266 S.W.2d 804 (1954), upon which the petitioner relies would not exclude this evidence.

Petitioner was afforded a fair trial as guaranteed to him by the Sixth and Fourteenth Amendments. The introduction of evidence of prior criminal convictions was proper as a recognized exception to the general rule excluding character evidence and was properly in accord with existing State evidentiary law.

II.

PETITIONER'S RIGHTS TO A FAIR TRIAL AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS WERE NOT ABRIDGED BY A JURY PANEL WHICH WAS RANDOMLY SELECTED AND SUBJECT TO PROPER EXCUSALS AND CHALLENGE.

Petitioner alleges an abridgment of his constitutional rights based upon the mere disproportionate number of his race who appeared for jury service. In this case, we do not have any disparity shown by competent evidence. Whereas, petitioner is black and was tried by an all white jury, there has been no showing of discrimination or even an opportunity for discrimination in the jury selection process. Furthermore, the racial composition of the jury panel and the community are not properly established in the record.

Petitioner moved to quash the jury panel prior to trial on the basis that it did not represent a fair cross section of the County. A hearing was held in chambers, evidence was presented and the trial court denied the motion. On appeal the Arkansas Supreme Court affirmed, having found no systematic exclusion of blacks. Statistics concerning the racial composition of the county were not submitted to the trial court at the hearing, but were submitted in a motion for a new trial. No statistics are available on the racial composition of the jury wheel except for statements by the trial court and counsel that five or six blacks had reported for jury duty on the first day.

Both the jury wheel and the jury panel were entirely selected by random. Upon determining the number of jurors needed for the year, names were selected at random by computer from the registered voters of the district pursuant to Ark. Stat. Ann. §39-205.1 (Repl. 1962). Prior to trial, three hundred and three names were again selected at random from the master list to be summoned. (T. 201-202) Prior to trial, the trial court did excuse a considerable number of jurors for reasons of age, health or handicap. Evidence as to the reasons for these dismissals was admitted at the hearing on the motion to quash the panel. The Arkansas Supreme Court found nothing which indicated an intent not to have a fair cross-section of the population represented. A charge was made and refuted by counsel that the State had a habit of peremptorily excusing blacks, however, no proof was offered on this point.

The random selection process does not guarantee a proportionately accurate cross section of the community to match the demographics of the area, nor is a defendant entitled to a jury, a venire, or jury roll with proportionate numbers of his race. Swain v. Alabama, 380 U.S. 202 (1965).

In Duren v. Missouri, 439 U.S. 357 (1979), upon which petitioner relies, the United States Supreme Court stated:

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show 1) that the group alleged to be excluded is a "distinctive" group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. 364

Assuming arguendo that petitioner has shown by competent proof the first two prongs of this test, there is absolutely no showing of any systematic exclusion of blacks from this jury.

The jury panel in this case was randomly selected and subject to proper excusals prior to trial and proper challenges during voir dire. Nothing in these procedures in any way abridged the petitioner's constitutional rights to a fair trial and equal protection.

III.

THE INTRODUCTION OF EVIDENCE OF PRIOR CRIMINAL CONVICTIONS IN THE PENALTY PHASE OF THE TRIAL WAS NOT PREJUDICIAL UNDER STATE LAW AND DID NOT ABRIDGE PETITIONER'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMEND- MENTS

Petitioner was found guilty of capital murder in a bifurcated trial. During the guilt phase of the trial, it was established that petitioner was unlawfully at liberty from a Tennessee correctional facility and in possession of recently stolen merchandise when he shot and killed an Arkansas State Policeman who was acting in the line of duty. During the penalty phase, the State introduced copies of records revealing five prior convictions of the petitioner.

The State introduced these records to negate a possible finding by the jury of the mitigating circumstance that the defendant had "no significant history of prior criminal activity." Ark. Stat. Ann. §41-1304(6) (Repl. 1977). The petitioner objected to the introduction of the documents and requested that they be suppressed or limited. The trial court did limit their introduction and instructed the jury that the prior convictions could be considered only in determining whether the mitigating circumstance of lack of any prior history of criminal convictions was present.

During the guilt phase of the trial, the jury had heard testimony from Sam Bachelor, Associate Warden for the Memphis Community Service Center, to the effect that the petitioner was a convicted felon and was unlawfully at liberty from a facility of the Tennessee Department of Correction. This testimony was allowed to establish the petitioner's motive and the trial court at that time did not permit testimony establishing the nature and details of those convictions as they were not

relevant for that purpose. (See Point I.)

The introduction of the records was somewhat cumulative as the jury could consider Bachelor's testimony in the penalty phase as well, the records were relevant on the issue of what constituted a "significant history" of prior criminal activity. The records reveal that petitioner was serving four concurrent terms of three years on convictions of two counts of grand larceny, one count of burglary in the second degree and one count of burglary in the third degree. In addition, there was a prior conviction of burglary in the third degree for which petitioner had served time in 1977.

In Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1981), the Arkansas Supreme Court found that the introduction of a prior burglary conviction without details of the crime was error in the jury's determination of the aggravating circumstance that "the person previously committed another felony, an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person." Ark. Stat. Ann. §41-1303(3) (1977).

Prior to Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), most circuit courts had been submitting all of the statutorily enumerated aggravating and mitigating circumstances to the jury for its consideration. In Miller, the Arkansas Supreme Court held the better practice to be to omit from submission any aggravating or mitigating circumstance which was completely unsupported by any evidence.

In the instant case, the trial court omitted five of the seven aggravating circumstances from the jury's consideration. The two aggravating circumstances submitted and unanimously found to exist by the jury were as follows:

- 1) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction.

2) The capital murder was committed for the purpose of avoiding or preventing an arrest

Ark. Stat. Ann. §41-1303 (2)(5) (Repl. 1977). The State agreed to the omission of subsection (3) which provides:

The person previously committed another felony, an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

Ark. Stat. Ann. §41-1303(3) (Repl. 1977) The latter was the aggravating circumstance in Williams v. State, supra, which was found to be improperly based upon a burglary conviction. The State objected to the omission of the following circumstance:

The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim.

Ark. Stat. Ann. §41-1303(4) (Repl. 1977)

Under Arkansas law, aggravating circumstances are limited to those in the statute, but mitigating circumstances are specifically not limited to those listed in the statute. In this case, all of the mitigating circumstances were submitted for the jury's consideration which was to the petitioner's advantage. One or more, but not all of the jury believed that a mitigating circumstances existed in that the petitioner did no harm to others prior to his arrest. This circumstance was listed in the space provided for "other" considerations on the mitigating factors verdict form. Though not statutorily enumerated as a mitigating factor, this circumstance is actually the absence of the aggravating circumstance listed in subsection (4) as to creating a great risk of harm to others.

On appeal, the Arkansas Supreme Court held that the prior convictions should not have been submitted to the jury to rebut the existence of a mitigating circumstance. Instead, the mitigating circumstance should have been omitted pursuant to the holding in Miller. The Court also found, however, that the submission of the prior convictions was harmless as the aggravating circumstance

improperly based on a burglary conviction in Williams was not submitted to the jury here.

"The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." Chapman v. California, 386 U.S. 18, 21 (1967) Respondent submits that the introduction of evidence of prior criminal convictions in the penalty phase of petitioner's trial was strictly a matter of state procedure and state law.

The Arkansas death penalty statutes applicable to sentencing are analogous to the Georgia statutes approved in Gregg v. Georgia, 428 U.S. 153 (1976) in that the jury's attention is properly focused on the circumstances of the crime and the characteristics of the defendant. No limitation is placed upon the jury's consideration of any mitigating factor. See, Eddings v. Oklahoma, ___ U.S. ___ (Jan 19, 1982); Lockett v. Ohio, 438 U.S. 586 (1978). Yet, the jury is given guidance in their consideration of whether aggravating circumstances exist, whether they outweigh any mitigating circumstances and whether the death penalty is justified, all beyond a reasonable doubt. Ark. Stat. Ann. §41-1302 - 1304 (Repl. 1977). Thus, the death penalty may be imposed consistently with fairness afforded each particular defendant. See, Furman v. Georgia, 408 U.S. 238 (1972).

Respondent submits that petitioner was afforded a fair trial. He was ably represented by counsel, was tried by an impartial jury, confronted those witnesses against him and had the opportunity to present witnesses in his favor. Petitioner did call a witness in the penalty stage which some jurors found credible in that some believed the mitigating circumstance of no threat of harm to others to be present. Yet the jury under proper instruction including limiting instructions on their consideration of the prior crime evidence, found the death penalty justified under all the circumstances of this case.

The fact that the Arkansas Supreme Court found the prior crimes evidence and instruction to be in violation of the recommended State procedure in Miller v. State, supra, does not elevate this error to constitutional dimensions. Especially in light of the fact that the Arkansas Supreme Court found the error harmless in that the jury's findings of aggravating circumstances was not based on this evidence. The jury's imposition of the death penalty was properly based only upon the circumstances of the crime and the characteristics of the defendant. Respondent submits that the sentencing procedures followed in this case afforded the petitioner his constitutional right to a fair trial.

IV.

PETITIONER'S RIGHT TO EQUAL PROTECTION AND RIGHT
TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT ARE
NOT ABRIDGED BY THE ARKANSAS CRIMINAL JUSTICE SYSTEM,
NOR IS THIS ISSUE PROPERLY BEFORE THIS COURT

Petitioner's four issue was not raised before the trial court or on appeal to the Arkansas Supreme Court. Respondent submits that this issue is not properly before this Court and petitioner's statistics and allegations are not a part of the record of this case.

The Arkansas statutes governing the imposition of the death penalty, Ark. Stat. Ann. §41-1301 et seq. (Repl. 1977) were passed in 1975. The arbitrary and capricious imposition of the death penalty as recognized in Furman v. Georgia, 408 U.S. 238 (1972) preceded the enactment of this legislation and is specifically mentioned in the commentary thereto. Respondents submit that this carefully drafted legislation ensures consistent application of the penalty and fairness to the accused. Gregg v. Georgia, 428 U.S. 153 (1976).

The State of Arkansas cannot be held accountable for death

penalties imposed in other jurisdictions and has taken legislative action to insure the just imposition of such a sentence in this State. While disputing petitioner's raising this issue and challenging his statistics, respondent feels compelled to offer the information that only seven out of twenty-five persons under sentence of death in Arkansas are black. This percentage (28%) is certainly not disproportionate to the percentage of blacks in the population in Arkansas. Thus, respondent submits that even if this issue were properly raised, it is totally without merit.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefore. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way which conflicts with applicable decisions of this Court or if it has decided an important question of federal law which has not been, but should be, settled by this Court.

Although respondent recognizes that review on writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his direct appeal.

Therefore, for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that a copy of the foregoing pleading has been served on petitioner herein, by mailing a copy of same, postage prepaid, addressed to his attorney Patrick J. Goss, 2200 Worthen Bank Building, Little Rock, Arkansas 72201, this 15th day of October 1982.

Leslie M. Powell
LESLIE M. POWELL